IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ERIC C. CANTRELL,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 15-3439
	)	
ROBERT A. MCDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S RESPONSE TO THE COURT'S DECEMBER 1, 2016, ORDER

Appellee, Robert A. McDonald, Secretary of Veterans Affairs, submits this response to the Court's December 1, 2016, Order. The Order instructed the Secretary to provide a supplemental memorandum of law addressing three issues: (1) under § 4.16(a), what types of employment qualify as "marginal employment" when earned annual income exceeds the poverty threhshold?; (2) what is the definition of "employment in a protected environment" in § 4.16(a), and what authorities support that definition?; and (3) should the Court defer to the Secretary's definition of "employment in a protected environment"?

As explained in this pleading, the Secretary's position is that (1) the plain language of § 4.16(a) indicates that "marginal employment" is to be defined by the Agency on a facts-found basis, that VA purposely used abstract language in the regulation to allow for flexibility in its application to new and unforeseen circumstances, and if the Court finds the regulatory language to be ambiguous in

that regard, it should defer to the Secretary's interpretation because it is consistent and supported by regulatory history; (2) the regulatory language indicates that a determination of whether a "protected environment" exists is also a factual determination to be made by the Agency "on a facts found basis" and; (3) the Court should defer to the Secretary's position regarding the definition of "protected work environment" because it is consistent with VA policy and is not plainly erroneous or inconsistent with the regulation's language.

A. The plain language of § 4.16(a) shows that the Department of Veterans Affairs (VA) intended the Agency's adjudicators to determine whether marginal employment exists when earned annual income exceeds the poverty threshold on a facts-found basis in each individual case

The plain language of § 4.16(a) shows that VA intended its adjudicators to determine the existence of marginal employment when earned annual income exceeds the poverty threshold on a case-by-case basis. In interpreting a regulation, the Court begins with the plain language of the regulation. *See Savage v. Shinseki*, 24 Vet.App. 259, 265 (2011) ("We begin with the plain language of the regulation."); *Lockheed Corp. v. Widnall*, 113 F.3d 1225, 1227 (Fed. Cir. 1997) ("To interpret a regulation we must look at its plain language and consider the terms in accordance with their common meaning."); *Otero-Castro v. Principi*, 16 Vet.App. 375, 380 (2002) (holding that in interpreting a statute or regulation, the "'starting point . . . is its language'" (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993))); *see also Black & Decker Corp. v. Comm'r of Internal Revenue*, 986 F.2d 60, 65 (4th Cir. 1993) ("Regulations, like

statutes, are interpreted according to canons of construction."). "Determining a statute's plain meaning requires examining the specific language at issue and the overall structure of the statute." *Gardner v. Derwinski*, 1 Vet.App. 584, 586 (1991) (citing *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 403–05, 108 S.Ct. 1255, 99 L.Ed.2d 460 (1988)), *aff'd sub nom*. *Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *aff'd*, 513 U.S. 115, 115 S.Ct. 552, 130 L.Ed.2d 462 (1964). This is a case where the language chosen by the Secretary in his regulation has a plain meaning.

The common definition of "marginal" includes something "close to the lower limit of qualification, acceptability, or function," and "barely exceeding the minimum requirements." *Marginal*, MERRIAM-WEBSTER'S ONLINE DICTIONARY (Dec. 15, 2016), https://www.merriam-webster.com/dictionary/marginal. Where, as here, the plain language is clear, the Court's inquiry is complete. *See Johnson v. Brown*, 9 Vet.App. 369, 371 (1996) (stating that when a reviewing court finds the terms of a law unambiguous, "judicial inquiry is complete" (quoting *Demarest v. Manspeaker*, 498 U.S. 184 (1991))). The regulatory language explains that deciding when marginal employment may be deemed to exist in a scenario in which a Veteran's annual income exceeds the established poverty threshold is a factual determination to be made by the factfinder in individual cases because the language asserts that such a determination should be made "on a facts found basis." 38 C.F.R. § 4.16(a). This is in keeping with the nature of TDIU claims, which are "based on an individual's particular circumstances"

and the regulation's statement that TDIU is assigned when a Veteran is, "in the judgment of the rating agency, unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities." *Id.*; *Pederson v. McDonald*, 27 Vet.App. 276, 286 (2015) (*citing Rice v. Shinseki*, 22 Vet.App. 447, 452 (2009).

Section 4.16 explains that "marginal employment" is not considered to be substantially gainful employment, and provides two scenarios in which a Veteran may be engaged in "marginal employment." 38 C.F.R. § 4.16(a). The regulation states that "marginal employment" may be deemed to exist when (1) a Veteran's earned annual income does not exceed the poverty threshold for one person as established by the United States Department of Commerce, Bureau of the Census; or (2) "on a facts found basis" when earned annual income does exceed the poverty threshold and "includes but is not limited to employment in a protected environment such as a family business or sheltered workshop." *Id.* In *Ortiz-Valles v. McDonald*, the Court held that because § 4.16 did not distinguish between a "substantially gainful occupation" and "substantially gainful employment," a logical reading of § 4.16 "compels the conclusion that a veteran might be found unable to secure or follow a substantially gainful occupation when the evidence demonstrates that he or she cannot secure or follow an occupation capable of producing income that is more than marginal [i.e. exceeds the poverty threshold]." 28 Vet.App. 65, 70-71 (2016). But as instructed by the Court's Order, this motion will focus only on the second scenario in which marginal

employment may be deemed to exist on a facts found basis when a Veteran's earned annual income exceeds the established poverty threshold.

The language of § 4.16(a) shows that determining what type of employment is "marginal" in this scenario is a factual determination is to be made by the Agency on a case-by-case basis because it defers to the Agency's role as the factfinder because it asserts that such a determination should be made on a "facts found basis." 38 C.F.R. § 4.16(a). Factual determinations are the province of the Agency in adjudicating veterans' claims, which the Court reviews for clear error on appeal. *See Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (The Court explaining that the Board functions as a factfinder). Because this is a factual determination to be made on a case-by-case basis, the plain language of the regulation refers to marginal employment in the abstract, leaving it to the Agency to determine the issue, which stands in contrast to the first scenario when earned annual income is below the poverty threshold, causing marginal employment to be established *ipso facto*. *See* 38 C.F.R. § 4.16(a). When read as whole, the plain language of the regulation therefore reflects the Secretary's intent to be abstract in identifying when marginal employment may exist when earned annual income exceeds the poverty threshold, providing discretion to the Agency's adjudicators. *See King v. Shinseki*, 26 Vet.App. 484, 488 (2014) (noting that in assessing the meaning of a regulation, words should not be read in isolation, but should be read in the context of the regulatory structure and scheme); *Smith v.*

Brown, 35 F.3d 1516, 1523 (Fed. Cir. 1994) ("only by . . . full reference to the context of the whole can the court find the plain meaning of a part.").

VA does not err when it uses abstract or even vague language in its regulations. In *Nyeholt v. Sec'y of Veterans Affairs*, the Federal Circuit declined to hold that Diagnostic Code (DC 7351) was void for being impermissibly vague. 298 F.3d 1350 (Fed. Cir. 2002). The claimant in that case challenged DC 7351 for being unconstiutitonally vague because it provided no standards to govern the assignment of a rating greater than 30% and because it was unclear what a Veteran must do to obtain a 100% rating. *Id.* at 1355.[1] The Federal Circuit disagreed, explaining that the Supreme Court articulated the standard that the void-for-vagueness doctrine relates to prohibitions not to entitlements, which was the issue currently before it. *Id.* at 1356. It held that such challenges must be directed to a statute or regulation that purports to limit or define speech or

[1] DC 7351 (Liver transplant) provides that:

> For an indefinite period from the date of hospital admission for transplant surgery……..…100
>
> Minimum……30
>
> Note: A rating of 100 percent shall be assigned as of the date of hospital admission for transplant surgery and shall continue. One year following discharge, the appropriate disability rating shall be determined by mandatory VA examination. Any change in evaluation based upon that or any subsequent examination shall be subject to the provisions of § 3.105(e) of this chapter.

38 C.F.R. § 4.114, DC 7351.

conduct. *Id.* at 1356-1357 (citing *Woodruff v. United States*, 954 F.2d 634 (11th. Cir. 1992)).

The situation in this case is similar because § 4.16 is a regulation that governs entitlement to TDIU benefits. It is not a constrictive regulation, but describes an ascertainable standard used by the Agency in considering marginal employment on a facts found basis. Consequently, VA may choose to use abstract language so that the regulation is drawn broadly to allow flexibility in its application to new and unforeseen circumstances. Because the plain language of § 4.16(a) reflects the Secretary's intent to defer to the Agency's factual determination of whether marginal employment exists in such situations, that language must control. *Tropf v. Nicholson*, 20 Vet.App. 317, 320 (2006) (quoting *Brown v. Gardner*, 513 U.S. 115, 120 (1994). This meaning is clear and unambiguous because the Agency is tasked with making factual determinations. To read the regulatory language otherwise would render that portion of the regulation stating that marginal employment is to be established on a "facts found basis" superfluous. *See Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) (noting that regulatory interpretation should "attempt to give full effect to all words contained within that statute or regulation, thereby rendering superfluous as little of the statutory or regulatory language as possible").

Alternatively, if the Court determines that the plain language of 38 C.F.R. § 4.16(a) is not clear in deferring to the Agency's role as the fact finder in making the factual determination of whether marginal employment exists, the Court

should defer to the Secretary's interpretation of the regulation. *See Savage v. Shinseki*, 24 Vet.App. at 266 (noting that "the Court should give deference to the Secretary's longstanding interpretation of his own regulations, provided that it is not plainly erroneous or inconsistent with the regulation"). "VA's interpretation of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *Reizenstein v. Shinseki*, 583 F.3d 1331, 1336 (Fed. Cir. 2009) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). This is true even when the Secretary provides this interpretation for the first time in his briefs during litigation, so long as there is "'no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.'" *Reizenstein,* 583 F.3d at 1335 (quoting *Auer*, 519 U.S. at 462).

The regulatory history of § 4.16 shows that VA intended for marginal employment to be considered on a facts found basis as currently described in the rating. In September 1987, the General Accounting Office[2] published a report reviewing VA's Unemployability Compensation Program. U.S. GEN. ACCOUNTING OFFICE, GAO-HRD-87-62, VETERANS' BENEFITS: IMPROVING THE INTEGRITY OF VA'S UNEMPLOYMENT COMPENSATION PROGRAM (1987).[3] The report noted that VA's regional offices determined eligibility for TDIU on a case-by-case basis. *Id.* at 3, 26. The report observed that in making case-by-case assessments, VA could "consider such factors as

[2] Now the U.S. Government Accountability Office (GAO).
[3] Complete report available at http://www.gao.gov/products/GAO/HRD-87-62.

number of hours worked, prior work history, availability of work, earnings, and time lost from work due to service-connected conditions." *Id.* at 26. Thus, operating on a factual basis allowed VA to consider the factors pertinent to each individual case. The report asserted that VA needed a consistently applied definition of "marginal employment" because at that time § 4.16(a) did not define "marginal employment." *Id.* at 18; *compare* 38 C.F.R. § 4.16(a) (1975) with 38 C.F.R. § 4.16(a) (1990).

VA subsequently amended § 4.16(a) to include a definition of "marginal employment" to be effective September 4, 1990. 55 Fed. Reg. 31579-31580 (Aug. 3, 1990) (to be codified at 38 C.F.R. 4.16(a)). VA noted that the determining factor is a Veteran's ability to earn, rather than the earnings themselves. *Id.* VA also found it pertinent to define what factors may show marginal employment when earned annual income exceeds the poverty threshold, noting that it revised the proposed regulation to include examples (discussed *infra*). *Id.* VA also reviewed the Office of Worker's Compensation Programs and Social Security Administration (SSA) regulations and found no reference to the term "marginal employment" or anything similar. *Id.* Thus, VA considered whether other agencies may have defined the term but did not adopt any such definition and chose to be abstract in discussing how marginal employment may be deemed to exist when earned annual income exceeds the poverty threshold.

A more recent GAO report on VA unemployability benefits was published in June 2015.[4] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-464, VETERANS' DISABILITY BENEFITS, VA CAN BETTER ENSURE UNEMPLOYABILITY DECISIONS ARE WELL SUPPORTED (2015). The study was conducted because TDIU is generally provided to Veterans "who are unable to maintain employment with earnings above the federal poverty guidelines due to service-connected disabilities." *Id.* Although the report did not expound on the existence of marginal employment when earned annual income exceeds the poverty threshold, it noted that rating specialists consider various subjective factors when determining a Veteran's eligibility for TDIU benefits. *Id.* at 16.

The Veterans' Adjudication Procedures Manual (M21-1) echoes the plain language and regulatory history of § 4.16(a), indicating that it is the Secretary's policy that the Agency makes a factual determination on whether marginal employment exists in individual cases. The M21-1 simply states that marginal employment exists "on a facts-found basis, and includes, but is not limited to, employment in a protected environment, such as a family business or sheltered workshop, when earned annual income exceeds the poverty threshold." M21-1, IV.ii.2.F.1.d. It also notes marginal employment "is by definition not substantially gainful employment." *Id.* Because the M21-1 does not define what types of employment are considered "marginal employment" and does not offer guidance on making this determination, it supports the Secretary's consistent position that

[4] Complete report available at: http://www.gao.gov/assets/680/670592.pdf.

the Agency must make this determination on an individual basis depending on the particular facts before it.

As noted *supra*, VA has included examples of when marginal employment may exist on a facts found basis, stating that it "includes but is not limited to employment in a protected environment such as a family business or sheltered workshop." 38 C.F.R. § 4.16(a). This language is non-exhaustive because it is not conceivable to contemplate every situation that may qualify as marginal employment, so the regulation purposely uses abstract language so as not to preclude consideration of a situation not otherwise listed in the regulation. But far from being a source of confusion, the regulation provides that the standard is a factual determination to be made by the Agency's adjudicators, similar to other determinations they are authorized to make as the factfinders. The regulatory language is therefore purposely abstract to preserve the Agency's role in making these determinations on a case-by-case basis as it did here. *See Nyeholt*, 298 F.3d at 1356-1357.

These sources indicate VA's intent, for at least the last 26 years, to determine the existence of marginal employment when earned annual income exceeds the poverty threshold on a case-by-case basis. As outlined above, the plain language of § 4.16(a) reflects the Secretary's intent to have his adjudicators make such determinations on a facts found basis. But if the Court finds that this language is vague or ambiguous, deference should be afforded to the

Secretary's interpretation because this understanding is long-standing and internally consistent.

B. VA has purposely chosen not to define "employment in a protected environment," leaving it to the discretion of the factfinder on case-by-case basis.

As discussed with marginal employment, VA has purposely chosen not to prescribe a precise definition of "protected environment," allowing the factfinder to make this determination on a case-by-case basis. As noted above, regulatory interpretation begins with the plain language of the regulation. *Lockheed Corp.*, 113 F.3d at 1227; *Savage*, 24 Vet.App. at 265; *Otero-Castro*, 16 Vet.App. at 380; *Black & Decker Corp.*, 986 F.2d at 65. The common definition of "protect" means "to cover or shield from exposure, injury, damage, or destruction" and "to maintain the status or integrity of especially through financial or legal guarantees." *Protect*, MERRIAM-WEBSTER'S ONLINE DICTIONARY (Dec. 15, 2016), https://www.merriam-webster.com/dictionary/protected. It is unclear from the plain language of § 4.16(a) what exactly constitutes a protected work environment. But because the regulation asserts that marginal employment may be established on a facts found basis, and may include employment in a protected work environment, determining the existence of a protected work environment is likewise part of the factual determination to be made by the Agency. 38 C.F.R. § 4.16(a).

The definition of "employment in a protected work environment" is not clear from the plain language of the regulation, so the Court should defer to the

Secretary's interpretation that this is a factual determination to be made on a case-by-case basis. Indeed, the Secretary's interpretation is not plainly erroneous or inconsistent with the language of § 4.16(a). *Savage*, 24 Vet.App. at 266; *Reizenstein*, 583 F.3d at 1336. The regulatory history shows that VA purposely referred to a protected work environment in the abstract so that it could have broad discretion in assessing the factual particularities of each case. In amending § 4.16 to incorporate the definition of marginal employment, one commentator suggested that VA define what factors would warrant a decision that marginal employment exists when earned annual income exceeds the poverty threshold. 55 Fed. Reg. 31579-31580. VA agreed, but instead of including definitions, VA "revised the proposed the regulation to include examples"–i.e., language illustrative of a protected work environment such as a family business or a sheltered workshop. *Id.* The M21-1 is also silent on what constitutes a protected work environment. M21-1, IV.ii.2.F. Thus, VA purposely chose not to expressly define a "protected work environment," referring to it instead by example among the facts to be considered by the factfinder.

The structure of § 4.16(a) also suggests that "marginal employment" and "protected environment" each refer to circumstances where the fact that a Veteran is working and his earned annual income exceeds the established poverty threshold are not incompatible with a finding that the Veteran is unable to engage in substantially gainful employment. The regulation first states that marginal employment exists *ipso facto* when a Veteran's earned annual income

is less than the poverty threshold, before stating that it may also exist when income exceeds that threshold but the facts of the particular case warrant a finding of marginal employment due to the nature of the situation. Section 4.16 therefore presumes that earning an income above the poverty threshold shows an ability to engage in substantially gainful employment, but that presumption may be rebutted when the circumstances of a particular case tend to show otherwise. Indeed, a finding of "marginal employment" or work in a "protected environment" is not itself proof of inability to engage in substantially gainful employment because a determination would still need to be made that the Veteran was actually incapable of engaging in substantially gainful employment. Thus, the Court should defer to the Secretary's interpretation that a determination of whether a Veteran is employed in a protected work environment is a factual determination to be made by the Agency on an individual basis because it is consistent with the language of the regulation and VA policy, and reflects the Agency's fair and considered judgment on the matter. *See Reizenstein,* 583 F.3d at 1335.

Although VA has chosen not to officially adopt any definition or terminology espoused by the SSA or other federal agencies, there is nothing that prohibits VA adjudicators from considering regulatory definitions promulgated by other agencies. As noted *supra*, VA considered whether other agencies had addressed marginal employment. *See* 55 Fed. Reg. 31579-31580. The Secretary notes that the SSA defines a "sheltered workshop" as "a private non-

profit, state, or local government institution that provides employment opportunities for individuals who are developmentally, physically, or mentally impaired, to prepare for gainful work in the general economy," with services that "may include physical rehabilitation, training in basic work and life skills (e.g., how to apply for a job, attendance, personal grooming, and handling money), training on specific job skills, and providing work experience in the workshop." Social Security Program Operations Manual System (POMS), Services for Sheltered Workshops, POMS RS 02101.270, *available at* https://secure.ssa.gov/apps10/poms.nsf/lnx/0302101270; *see also* Sheltered Worskshops, POMS SL 60001.645, *available at* https://secure.ssa.gov/poms.nsf/lnx/1960001645. It has also explained that sheltered employment is "employment provided for handicapped individuals in a protected environment under an institutional program," the most common types of which include: sheltered workshops (engaging in manufacturing, assembly, reconditioning, repair, and other operations); hospitals, VA domicliaries, and long-term care institutions; and homebound employment. Social Security Ruling 83-33 (SSR 83-33): Titles II and XVI: Determining whether work is Substantially Gainful Activity – Employees. Thus, "protected environment" or "sheltered workshop" are terms of art, the existence of which VA believes should be left to the discretion of the Agency to determine on an individual basis, as it properly did here.

In this case, the Board considered the nature of Appellant's job duties as a park ranger on a facts found basis and properly determined that they do not qualify as marginal employment. R. at 17. The Board emphasized that the nature of his employment did not show that he worked in a protected environment, but that his job entailed significant responsibilities and his workplace accommodations allowed him to fulfill those responsibilities. R. at 17. Appellant was able to fulfill his duties as a park ranger–a competitive occupation that differs from what is contemplated by a sheltered workshop, as noted *supra*. R. at 17. Consequently, the Board properly considered whether marginal employment exists on a facts found basis.

There is no legal basis to support Appellant's contention that a "protected work environment" means "a work environment in which [ ] a veteran [is] allowed [to] maintain employment because the employer provide[s] accommodations that protect the veteran by allowing him or her to work despite not being able to meet the normal criteria required for such an occupation." Appellant's Brief (App. Br.) at 15. The Court should reject Appellant's definition of a "protected work environment" and defer to the Secretary's interpretation that the Agency is to make this determination on a facts found basis for two reasons. First, Appellant's definition creates an absurd result because it essentially states that a protected work environment is present (and consequentially potential entitlement to TDIU) whenever an employer offers accommodations to a disabled Veteran. *Mitchell v. Shinseki*, 25 Vet.App. 32, 43 (2011) (stating that "when an interpretation, such

as the appellant's, is not compelled by the language of the regulation, is not supported by caselaw, and has absurd effects, it must be firmly rejected."). Under this definition, if an employer does not provide reasonable accommodations to a disabled Veteran, they violate the Americans with Disabilities Act's (ADA) prohibition of unlawful discrimination; but if an employer does provide such accommodations, then they are creating a protected work environment, giving rise to a TDIU claim. *See* 42 U.S.C. § 12101 et seq. (Americans with Disabilities Act of 1989). This creates a conflict between § 4.16(a) providing for TDIU benefits when there is marginal employment and the ADA's requirement that employers provide reasonable accommodations to their disabled employees.

Second, the Supreme Court has noted that reasonable accommodations may include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations." *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 803, 119 S. Ct. 1597, 1602 (1999) (citing 42 U.S.C. § 12111(9)(B). The accommodations that Appellant contends make his employment "protected," notably his overnight shift work schedule, are already considered to be reasonable. App. Br. at 16. Consequently, the Court should reject his definition of a "protected work environment" because he has been able to perform his job

successfully amidst these reasonable accommodations. Instead, the Court should adopt the Secretary's position that a determination of what constitutes a protected work environment should be established on a facts found basis by the Agency, and that the regulatory history noted above shows that VA purposely used abstract language in § 4.16(a) to allow flexibility in its application to new and unforeseen circumstances.

Accordingly, the Court should affirm the Board's decision because the Board properly found that Appellant's employment did not constitute a "protected work environment" and that "marginal employment" did not exist in this case.

WHEREFORE, Appellee, Robert A. McDonald, Secretary of Veterans Affairs, respectfully responds to the Court's December 1, 2016, Order.

Respectfully submitted,

LEIGH A. BRADLEY
General Counsel

MARY ANN FLYNN
Chief Counsel

/s/ Kenneth A. Walsh
KENNETH A. WALSH
Deputy Chief Counsel

/s/ Omar Yousaf
OMAR YOUSAF
Appellate Attorney
Office of General Counsel (027J)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, DC 20420
(202) 632-8395

Attorneys for Appellee Secretary
of Veterans Affairs